ARNOLD & PORTER
555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202
(202) 942-5000
FACSIMILE (202) 942-5999

NEW YORK
DENVER
LOS ANGELES
LONDON

STEPHANIE M. PHILLIPPS
(202) 942-5505

June 27, 1996

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554-0001

Re: REPLY COMMENTS OF THE NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS in In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 (CS Docket No. 96-85)

Dear Mr. Caton:

Enclosed is an original and eleven (11) copies of the Reply Comments of the New York City Department of Information Technology and Telecommunications in the above-referenced docket. By copy of this letter we are also providing Nancy Stevenson of the Cable Services Bureau a copy of the Reply Comments and a diskette containing the Reply Comments.

If you have any questions regarding the enclosed filing, please call the undersigned at 202-942-5505.

Sincerely,

Stephanie M. Phillipps

Stephanie M. Phillipps

Enclosures

cc: Nancy Stevenson (w/diskette)
Cable Services Bureau
International Transcription Services, Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C 20554

In the Matter of	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	CS Docket No. 96-85

To: The Commission

REPLY COMMENTS OF THE NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

Salvador C. Uy
Assistant Commissioner
Cable Television and
Telecommunications Policy

Gary S. Lutzker
Telecommunications
Counsel

Kimberly Auerbach
Legal Assistant

11 Metrotech Center
Third Floor
Brooklyn, New York 11201
(718) 403-8200

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act	)	
Reform Provisions of the	)	CS Docket No. 96-85
Telecommunications Act	)	
of 1996	)	
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To: The Commission

REPLY COMMENTS OF THE NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

The New York City Department of Information Technology and Telecommunications ("City of New York" or "City") submits these reply comments in connection with the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* (*"Notice"*) in the above-captioned proceeding.

I. INTRODUCTION

The City of New York welcomes the advent of competition in the multichannel distribution market. Until such competition materializes, however, the Commission should maintain the consumer protections that Congress intended. Deregulation of incumbent cable operators' rates should not occur

unless such operators face an actual competitor or competitors. While local exchange carriers ("LECs") may be formidable competitors with vast resources, the Commission should continue to protect cable television consumers from monopoly prices by requiring that a LEC or its affiliate have a significant presence in a cable franchise area before deregulating cable rates.

In addition, for purposes of the new effective competition test, the affiliation standard should not be satisfied by an aggregation of LEC interests. The public interest demands that minute LEC investments in multichannel video programming distributors ("MVPDs") should not constitute "effective" competition. Such nominal investments do not benefit a meaningful portion of the subscribers in a franchise area, and yet would permit incumbent cable operators to charge monopoly rates to captive consumers

Finally, Section 624(e) does not amend or rescind the franchising or renewal provisions of the Communications Act, which explicitly permit local franchising authorities to consider technical standards in renewal, transfer, and franchising proceedings.[1]

II. DISCUSSION

A. The Commission Should Require That LECs Offer Service To A Substantial Portion Of The Franchise Area In Order To Satisfy The New Effective Competition Test.

To promote competition and enhance consumer choice, the

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104,§§621, 626, 110 Stat. 56 (approved Feb. 8, 1996) ("1996 Act"), amending the Communications Act of 1934, Pub. L. No. 73-416, Stat. 1064 (1934).

Telecommunications Act of 1996 encourages telephone companies to enter the video programming market.[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), the Commission was required to promulgate regulations designed to protect subscribers from paying unreasonable rates.[3] Rate regulation, however, does not apply to cable systems that face effective competition.[4]

In its comments in response to the *Notice*, the City emphasized the continuing need to protect consumer interests. We suggested that the Commission require that a LEC or its affiliate offer service to 50 percent of existing subscribers in the franchise area as a condition precedent to a finding of effective competition. This is consistent with Congress's intent to protect consumers and ensure that cable television operators do not exercise undue market power.[5]

Consequently, a LEC or its affiliate should be offering comparable video services to more than a token number of subscribers in a franchise area prior to a finding of effective competition. Truly effective competition will exist only when a significant number of consumers have a realistic choice of MVPDs. Token service does not give consumers real choice. Only when there is real consumer choice should the incumbent cable operator's service be deregulated, and only

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[2] Communications Act, §651.

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, §3(a)(2)(A), 47 U.S.C. §543.

[4] Communications Act, §623(a)(2).

[5] 1992 Cable Act §2(b)(4), (5).

then will Congress's intent to prevent cable operators from exercising undue market power be achieved.

Contrary to the comments filed by several cable operators and telephone companies,[6] the absence of a pass or penetration rate in the new test for effective competition does not mean that Congress intended no threshold to be applicable. To protect the public interest, the Commission must set a standard and not assume, as certain cable operators and telephone companies argue, that LEC-affiliated provision of video programming to even a single building in a franchise area will be sufficient to have a restraining effect on cable rates.

The City is aware of a LEC's proposal to provide an interactive video service to the City's financial community. Under the proposal, subscribers would be able to access specific pre-selected information from broadcast and cable programming services from their desktop personal computer. The proposal would provide at least twelve channels with at least one broadcast channel, meeting the Commission's standard for comparable programming.[7] Yet only an extremely small group would have any use for the service. While the programming will be invaluable to stock market analysts, it will not be made available to the overwhelming majority of residential subscribers in the franchise area. If the

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[6] Comments of The National Cable Television Association, Inc., CS Docket No. 96-85, at 9-10 (filed June 4, 1996); Comments of Cox Communications, Inc., CS Docket No. 96-85, at 8-10 (filed June 5, 1996); Comments of Time Warner Cable, CS Docket No. 96-85, at 13 (filed June 4, 1996); Comments of Bell Atlantic, CS Docket No. 96-85, at 1 (filed June 4, 1996).

[7] *See* 47 C.F.R. §76.905(g).

Commission were to accept the cable operators' arguments, this kind of service would satisfy the new effective competition standard and incumbent cable operators' rates would be deregulated despite a total lack of competition in the residential market.

The Commission must not interpret the absence of a pass or penetration rate in the new effective competition test to mean that no cable television regulation is necessary whenever a LEC or its affiliate provides any video programming service. Although the "plain language" of the new effective competition standard does not specify a pass or penetration rate, the spirit of the statute would be eviscerated if residential consumers were subjected to skyrocketing rates when only a token number of business subscribers have a choice of MVPDs.

Congress intentionally left the new effective competition test vague so that the Commission could regulate in the best interest of the consumer. The Commission must not only establish a threshold, but must debate other issues, such as program access, when defining effective competition. Some LECs argue in their comments that there cannot be effective competition until competitors have fair access to the programming offered by the incumbent cable operator.[8] In addition to establishing a pass rate, the Commission must decide whether effective competition exists if LECs are denied access to popular programming

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[8] Comments of BellSouth Corporation, CS Docket No. 96-85, at 2-3 (filed June 4, 1996).

carried by the incumbent. Only by considering such important factors will the Commission protect consumers and ensure that incumbent cable operators' rates will not be deregulated before competition is truly effective.

B. The Commission Should Not Aggregate Various LEC Interests In Determining Whether An Affiliation Exists.

In its Comments, the City of New York also suggested that any affiliation standard adopted by the Commission for purposes of the new effective competition test must be met by a single LEC, not an aggregation of LEC interests. Consistent with the City's position, SBC Communications Inc. also opposed the aggregation of LEC interests with regard to the "affiliate" definition.[9] Consumer interests will not be protected if effective competition is based on a LEC's *de minimis* investment in an existing MVPD. If aggregation were permitted, an MVPD serving an insignificant number of subscribers would constitute effective competition under the new standard merely because it has sold small interests in its operation to several telephone companies. Clearly, this neither promotes competition nor protects the public interest.

Notwithstanding comments filed by some cable operators,[10] Congress did not intend the Title I definition of "affiliate" to determine ownership affiliation in the context of the new effective competition test. Congress has given the Commission discretion to set a significantly higher ownership threshold than that

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[9] Comments of SBC Communications Inc., CS Docket No. 96-85, at 3 (filed June 4, 1996) ("SBC Comments").

[10] NCTA Comments at 14; Cox Comments at 12.

found in Title I. In allowing the Commission such discretion, Congress has implicitly acknowledged that a LEC should have a substantial investment in an MVPD before affiliation is found. Until then effective competition does not exist under the new standard.

The City reiterates its recommendations that the Commission adopt an ownership affiliation standard of 50 percent or more for purposes of the new effective competition standard. A lesser standard would allow incumbent cable operators to raise rates even though no LEC would have a controlling interest in any one MVPD. This is not effective competition, nor is it a pro-competitive policy.

The Commission should not lose sight of the fact that just because a LEC has the *potential* to be a formidable competitor to an incumbent cable operator, such an outcome is not certain. Great financial resources and marketing experience will not create effective competition if the LEC does not intend to service a substantial portion of the cable franchise area. If this is the case, subscribers must be protected against premature deregulation of cable rates. The Commission consequently should ensure that the LEC has substantial ownership or control over an affiliate prior to a finding that such affiliate satisfies the effective competition test.

C. Technical Standards Must Still Be Considered A Factor In Renewal

Contrary to the implication of several cable operators,[11] the 1996 Act was not intended to affect the franchising or renewal provisions of the Communications Act. The statute explicitly authorizes technical considerations in cable renewal and transfer procedures. The local franchising authority may still require proposals for upgrade of the cable system under Section 626 of the Cable Act and consider the quality of the operator's service, including signal quality, during the renewal process.[12] In addition, Section 621 of the Cable Act states that in awarding a franchise, the franchising authority may require that the operator have the "technical" qualifications to provide cable service.[13] The amendment of 624(e) should not be construed as affecting these two sections. If Congress had intended to alter the renewal provisions of the Act with regard to technical standards, it would have done so in the 1996 Act.

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[11] Cox Comments at 18; Comments of Comcast Cable Communications, Inc., CS Docket No. 96-85, at 20 (filed June 4, 1996).

[12] Communications Act §626(c)(1)(B), 47 U.S.C. §546(c)(1)(B).

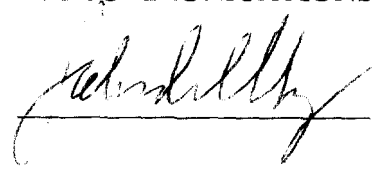
[13] Communications Act §621(a)(4)(C), 47 U.S.C. 541.

III. CONCLUSION

For the foregoing reasons, the City urges the Commission to adopt the approaches recommended herein. The Commission should ensure that the determination of whether cable systems are subject to effective competition does not unfairly deprive consumers of the protection from unreasonable cable rates that Congress intended.

Respectfully Submitted,

NEW YORK CITY
DEPARTMENT OF
INFORMATION TECHNOLOGY
AND TELECOMMUNICATIONS

By: 

Salvador C. Uy
Assistant Commissioner
Cable Television and
Telecommunications Policy

Gary S. Lutzker
Telecommunications
Counsel

Kimberly Auerbach
Legal Assistant

11 Metrotech Center
Third Floor
Brooklyn, New York 11201
(718) 403-8200

Dated: June 26, 1996